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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RUBEN DARIO GARCIA, JR.,
CDCR # J-73373,

Plaintiff,

vs.

D. STRAYHORN; J. LUNA; C.P.
FRANCO; CAPTAIN K. REID; A.
HERNANDEZ; JOHN/JANE DOES 1-5,

Defendants.

Civil No. 13cv0807 BEN (KSC)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA
PAUPERIS*; AND**

**(2) DISMISSING FIRST
AMENDED COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2)(B) & 1915A(b)**

Plaintiff, a state inmate incarcerated at the Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has also filed Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a). (ECF No. 2.) Before the Court could conduct the required *sua sponte* screening, Plaintiff filed his First Amended Complaint (“FAC”) which is now the operative pleading. (ECF No. 3.)

1 **I. MOTION TO PROCEED IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the
 3 United States, except an application for writ of habeas corpus, must pay a filing fee of
 4 \$350. *See* 28 U.S.C. § 1914(a); S.D. CAL. CIVLR 4.5.¹ An action may proceed despite
 5 a party's failure to pay only if the party is granted leave to proceed IFP pursuant to 28
 6 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007);
 7 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to
 8 proceed IFP however, remain obligated to pay the entire fee in installments, regardless
 9 of whether the action is ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1)
 10 & (2).

11 The Court finds that Plaintiff has submitted an affidavit which complies with 28
 12 U.S.C. § 1915(a)(1), and that he has attached a certified copy of his trust account
 13 statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust
 14 account statement shows that he has insufficient funds from which to pay an initial
 15 partial filing fee.

16 Accordingly, the Court **GRANTS** Plaintiff's Motion to Proceed IFP and assesses
 17 no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further orders
 18 the Secretary of the California Department of Corrections and Rehabilitation ("CDCR")
 19 to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward
 20 them to the Clerk of the Court pursuant to the installment payment provisions set forth
 21 in 28 U.S.C. § 1915(b)(1).

22 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

23 The Prison Litigation Reform Act ("PLRA")'s amendments to 28 U.S.C. § 1915
 24 also obligate the Court to review complaints filed by all persons proceeding IFP and by
 25 those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of,
 26 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or

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 28 ¹ The fee for an ordinary civil filing increased to \$400 effective May 1, 2013. Plaintiff
 commenced this action before that date.

1 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
 2 practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under
 3 these provisions, the Court must *sua sponte* dismiss any prisoner civil action and all
 4 other IFP complaints, or any portions thereof, which are frivolous, malicious, fail to state
 5 a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C.
 6 §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)
 7 (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir. 2000)
 8 (§ 1915A).

9 **A. 42 U.S.C. § 1983**

10 To state a claim under § 1983, Plaintiff must allege that: (1) the conduct he
 11 complains of was committed by a person acting under color of state law; and (2) that
 12 conduct violated a right secured by the Constitution and laws of the United States.
 13 *Humphries v. Cnty. of Los Angeles*, 554 F.3d 1170, 1184 (9th Cir. 2009) (citing *West v.*
 14 *Atkins*, 487 U.S. 42, 48 (1988)).

15 Plaintiff's First Amended Complaint alleges that Defendants conspired,
 16 discriminated and retaliated against him for exercising his right to petition for redress
 17 through the CDC's inmate grievance procedures. To allege a claim of conspiracy under
 18 § 1983, Plaintiff must allege facts with sufficient particularity to show an agreement or
 19 a meeting of the minds to violate his constitutional rights. *Margolis v. Ryan*, 140 F.3d
 20 850, 853 (9th Cir. 1998); *Woodrum v. Woodward Cnty.*, 866 F.2d 1121, 1126 (9th Cir.
 21 1989). Thus, pleading a conspiracy requires more than a conclusory allegation that
 22 Defendants conspired to deprive Plaintiff's civil rights. The Ninth Circuit applies a
 23 heightened pleading standard to conspiracy claims under Section 1983 and has held that
 24 mere conclusory allegations of conspiracy (i.e. bare allegations that a defendant
 25 "conspired" with another) are insufficient to state a claim.² *See Harris v. Roderick*, 126

26
 27 ² The Ninth Circuit has specifically held that conspiracy claims are subject to this heightened
 28 pleading standard because they require the plaintiff to show that the defendant agreed to join the
 conspiracy. *See Harris*, 126 F.3d at 1195; *Margolis*, 140 F.3d at 853; *Mendocino Envt'l Ctr. v.*
Mendocino Cnty., 14 F.3d 457, 459 (9th Cir. 1994) (applying identical standard to conspiracy claim in
Bivens action). Although the Ninth Circuit eliminated the application of a heightened pleading standard

1 F.3d 1189, 1195 (9th Cir. 1997); *Buckey v. Cnty. of Los Angeles*, 968 F.2d 791, 794 (9th
 2 Cir. 1992). As currently pleaded, however, Plaintiff's conspiracy claims amount to no
 3 more than "vague and conclusory allegations of official participation in civil rights
 4 violations," therefore, they fail to state a claim. *See Ivey v. Bd. of Regents*, 673 F.2d
 5 266, 268 (9th Cir. 1982); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)
 6 (conclusory allegations of conspiracy insufficient to support a claim under section 1983
 7 or 1985).

8 Plaintiff also suggests that he is being "discriminated" against or being treated
 9 differently than other prisoners. The "Equal Protection Clause of the Fourteenth
 10 Amendment commands that no State shall 'deny to any person within its jurisdiction the
 11 equal protection of the laws,' which is essentially a direction that all persons similarly
 12 situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr. , Inc.*, 473
 13 U.S. 432, 439 (1985); *Shaw v. Reno*, 509 U.S. 630 (1993). "The guarantee of equal
 14 protection [under the Fifth Amendment] is not a source of substantive rights or liberties,
 15 but rather a right to be free from invidious discrimination in statutory classifications and
 16 other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980) (citations
 17 omitted). As with claims of conspiracy, conclusory allegations of discrimination are
 18 insufficient to state a claim, unless Plaintiff alleges facts which may prove invidious
 19 discriminatory intent. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*,
 20 429 U.S. 252, 265 (1977). Therefore, to allege an equal protection violation, Plaintiff
 21 must plead facts to show that each Defendant "acted in a discriminatory manner and that
 22 the discrimination was intentional." *FDIC. v. Henderson*, 940 F.2d 465, 471 (9th Cir.
 23 1991) (citations omitted); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th
 24 Cir. 2000). "'Discriminatory purpose' . . . implies more than intent as volition or intent
 25 as awareness of consequences. It implies that the decision maker . . . selected or
 26 reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite
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28 to all cases where an improper motive is an element, it did not modify the requirement in regard to
 allegations of conspiracy. *See Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

1 of,’ its adverse effects upon an identifiable group.” *Pers. Adm’r of Mass. v. Feeney*, 442
 2 U.S. 256, 279 (1979). “[P]urely conclusory allegations of alleged discrimination, with
 3 no concrete, relevant particulars,” are simply insufficient. *Forsberg v. Pac. Nw. Bell Tel.*
 4 Co., 840 F.2d 1409, 1419 (9th Cir. 1988). Here, Plaintiff fails to allege he is a member
 5 of a protected class and he has failed to allege any “concrete, relevant” facts to show that
 6 he was treated differently with a “discriminatory purpose.” *City of Cleburne*, 473 U.S.
 7 at 439; *Forsberg*, 840 F.3d at 1419; *Feeney*, 442 U.S. at 279. Thus, Plaintiff’s equal
 8 protection allegations fail to state a claim upon which relief can be granted. *See Lopez*,
 9 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

10 Plaintiff also seeks to hold some of the Defendants liable in their supervisory
 11 capacity. However, there is no respondeat superior liability under 42 U.S.C. § 1983.
 12 *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into
 13 causation must be individualized and focus on the duties and responsibilities of each
 14 individual defendant whose acts or omissions are alleged to have caused a constitutional
 15 deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*,
 16 423 U.S. 362, 370-71 (1976)). In order to avoid the respondeat superior bar, Plaintiff
 17 must allege personal acts by each individual defendant which have a direct causal
 18 connection to the constitutional violation at issue. *See Sanders v. Kennedy*, 794 F.2d
 19 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). As a
 20 supervisor, a defendant may only be held liable for the allegedly unconstitutional
 21 violations of his subordinates if Plaintiff alleges specific facts which show: (1) how or
 22 to what extent this supervisor personally participated in or directed Defendants’ actions,
 23 and (2) in either acting or failing to act, the supervisor was an actual and proximate cause
 24 of the deprivation of his constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th
 25 Cir. 1978). As currently pleaded, however, Plaintiff’s First Amended Complaint in no
 26 way sets forth facts which might be liberally construed to support an individualized
 27 constitutional claim against Defendants Franco, Reid or Hernandez.

28 Therefore, the Court must also sua sponte dismiss Plaintiff’s respondeat superior

1 claims for failing to state a claim upon which relief can be granted pursuant to 28 U.S.C.
2 § 1915(e)(2) and 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

3 For these reasons, the Court finds that Plaintiff's First Amended Complaint must
4 be **DISMISSED** without prejudice for failing to state a claim upon which relief can be
5 granted.

6 **III. CONCLUSION AND ORDER**

7 Good cause appearing, **IT IS HEREBY ORDERED:**

8 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No.
9 2) is **GRANTED**.

10 2. The Secretary of California Department of Corrections and Rehabilitation,
11 or his designee, shall collect from Plaintiff's prison trust account the \$350 balance of the
12 filing fee owed in this case by collecting monthly payments from the account in an
13 amount equal to twenty percent (20%) of the preceding month's income and forward
14 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
15 accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY**
16 **IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

17 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey
18 Beard, Secretary, California Department of Corrections and Rehabilitation, 1515 S
19 Street, Suite 502, Sacramento, California 95814.

20 **IT IS FURTHER ORDERED** that:

21 4. Plaintiff's First Amended Complaint is **DISMISSED** without prejudice
22 pursuant to 28 U.S.C. § 1915(e)(2)(b) and § 1915A(b). However, Plaintiff is
23 **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file
24 a Second Amended Complaint which cures all the deficiencies of pleading noted above.
25 Plaintiff's Amended Complaint must be complete in itself without reference to the
26 superseded pleading. *See S.D. CAL. CIVLR 15.1.* Defendants not named and all claims
27 not re-alleged in the Amended Complaint will be deemed to have been waived. *See King*
28 *v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

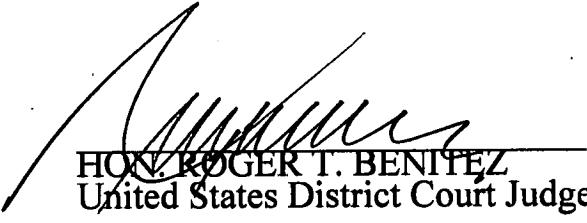
1 5. The Clerk of Court is directed to mail Plaintiff a copy of a Court approved
2 civil rights complaint form.

3 **IT IS SO ORDERED.**

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5 DATED: June 14, 2013

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HON. ROGER T. BENITEZ
United States District Court Judge

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